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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

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No. 139

CHICAGO AND NORTHWESTERN RAILWAY COMPANY, et al.,
Petitioners,

v.

ROCKWELL LIME COMPANY, et al.,
Respondents.

RESPONDENTS' BRIEF IN RESISTANCE TO PETITIONERS' APPLICATION FOR WRIT OF CERTIORARI.

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IN THE

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No. 139

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Petitioners,

v.

ROCKWELL LIME COMPANY, et al.,
Respondents.

RESPONDENTS' BRIEF IN RESISTANCE TO PETITIONERS' APPLICATION FOR WRIT OF CERTIORARI.

May It Please the Court:

The petition herein is for a *writ of certiorari* to the Supreme Court of Illinois to review its judgment, which affirmed the judgment of the Circuit Court of Cook County, Illinois. The judgment of the Circuit Court vacated and set aside an order of the Illinois Commerce Commission and remanded the cause for further proceedings. The said order of the Illinois Commerce Commission dismissed respondents' complaint and declined to determine the issues

presented, to wit, (*a*) whether illegal rates had been imposed upon respondents' intrastate traffic, and (*b*) what were the rates legally applicable thereto as set forth and contained in tariffs lawfully on file with the Commission at the time the shipments in question were made. The judgment of the Supreme Court of Illinois, in reviewing the order of the Circuit Court, determined upon the validity of the Commission's order, declared the law of the case, and affirmed the order of the Circuit Court which contained directions to the Commission to hold further hearings consistent with the findings of the Court and to determine, among other things, the question of damages and the amount thereof (R. 202-204, 237-238).

Respondents respectfully challenge the jurisdiction of this Court in the premises, and herewith submit their objections in said regard and brief in resistance to the petition.[1]

Judgment of the Court Below.

The judgment of the Supreme Court of Illinois, *Rockwell Lime Co. et al.* v. *Chicago and North Western Railway Co. et al.*, entered February 13, 1940, is reported in 373 Ill. 309, 26 N. E. (2d) 99, and appears at pages 225-237 of the record. The findings, judgment and order of the Circuit Court of Cook County, Illinois, entered March 28, 1939, setting aside and remanding the order of the Illinois Commerce Commission, which judgment and order of the said Circuit Court was affirmed by the Supreme Court of Illinois, appears at pages 202-204 of the record. The order of the Illinois Commerce Commission, No. 18642, *Rockwell Lime Co. et al.* v. *Wabash Railway Co. et al.*, entered January 4, 1933, appears at pages 2-17 of the record.

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[1] Rule 38:3.

Basis of Jurisdiction Invoked by Petitioners.

The initial or primary ground upon which petitioners rest their application is that the judgment of the Supreme Court of Illinois allegedly constitutes a final judgment or order within the meaning of, and as required by, Section 237 (b) of the Judicial Code, as amended by act of February 13, 1925, 43 Stat. 936, 937 (28 U. S. C. A., Sec. 344). The petition wrongfully alleges that the judgment is final (Pet. p. 10), but it is clear that the action of the Supreme Court of Illinois does not operate to terminate the litigation on the merits in respect of all controlling issues of the case, but instead remands the cause for further proceedings. *Post*, pp. 29-35.

Otherwise, the chief basis of jurisdiction invoked by petitioners, as argued by them (Pet. pp. 13-17), and by which they seek to suggest a federal question in relation to the judgment of the Supreme Court of Illinois, is that the latter's action allegedly operates, in a manner not named, to defeat or conflict with the provisions of Section 13 (3) of the Interstate Commerce Act. [49 U. S. C. A., Sec. 13 (3)]. That provision has relation, however, only to proceedings instituted under Section 13 (4) of the Interstate Act, and the order of the Illinois Commission herein quite obviously is not within the purview of either of the said provisions. *Post*, p. 66.

Statement of the Case.

Petitioners' statement of the case consists, in the main, of conclusions which, respondents consider, are largely unsupported by the record and which, it is respectfully submitted, unquestionably fail to disclose the issues actually presented to, and resolved by, the Courts below.

In litigation of the present character, a correct factual statement of the matters in controversy and decided is manifestly not only proper but essential and indispensable. To place before this Court that which is necessary to disclose the questions here presented and essential to the proper disposition of the petition and the determination of this Court's jurisdiction in the premises, it is desirable to summarize:

1. The subject matter of the controversy before the Illinois Commerce Commission, the proceedings and issue before that tribunal, the order entered by that Commission, and the predicate therefor.

2. The decision of the Supreme Court of Illinois, the issues upon which the case there turned, and the grounds upon which the decision was based. In that regard it will be developed (*a*) that the judgment is not final, (*b*) that the judgment was premised exclusively upon local law and practice and that no federal question was decided or necessary to the disposition of the controversy, (*c*) that petitioners have an adequate remedy at law, and (*d*) that, on the record, there is an absence of substance to errors alleged by petitioners.

3. The issues and legal effect of certain decisions of the Interstate Commerce Commission and Illinois Commerce Commission to which petitioners refer, which constitute their only evidence in defense, and which chiefly provide the inducive premises for the federal question here sought to be invoked.

The Order of the Illinois Commission and Proceedings Before That Tribunal.

Respondents' complaint to the Illinois Commission related to rates and charges exacted upon shipments having their origin and destination within the State of Illinois. The complaint alleged that during the period September 10, 1925 to February 15, 1927, petitioners, contrary to the law of Illinois and their tariffs, rates and charges lawfully on file with the Illinois Commission and legally in effect during said period, imposed upon and exacted from respondents in connection with shipments of sand and gravel made by them from their operations located on petitioners' lines to the Chicago (Ill.) switching district rates and charges which were illegal, as distinguished from unreasonable (R. 19-29).

The rates and charges alleged to have been illegal and illegally exacted, as aforesaid, were (1) single line rates, (that is, rates applicable to shipments having their origin and destination on petitioners' lines) of 65 cents per ton, and (2) connecting line switching charges, (that is, charges added to the single line rates, in connection with shipments originating on petitioners' lines but destined to a point on a connecting line) of 30 cents per ton, or about $15.00 per car (Exhibits 1 and 3, R. 42-46, 211-213). The complaint prayed damages and restitution to the basis of rates alleged legally applicable in the premises which, it was averred, were 60 cents single line, and $3.60 per car upward connecting line (R. 19-29, 211-213). The complaint comprehended strictly intrastate commerce, was founded upon and invoked the relief and remedy provided by the laws of the State of Illinois, and more particularly the

Illinois Utilities Act and Sections 32, 36, 37 and 72 thereof (R. 21-29). Ill. Rev. Stat. 1939, Chap. 111 2/3, State Bar Assn. Ed., Pars. 32, 36, 37, 76.

In substance, respondents' action before the Illinois Commission was that at common law for money had and received. The controversy quite obviously was of a private character between private parties. The issue of the action manifestly presented a question of law and the legal effect of the evidence which neither involved nor permitted the exercise of administrative discretion (R. 231).

The genesis of the controversy may be described thus:

On August 10, 1925, petitioners, together with about forty other Illinois carriers, filed with the Illinois Commission a tariff, referred to in the order of that Commission and herein as Agent B. T. Jones tariff, Ill. C. C. No. 171, in which it was proposed, *inter alia,* to change numerous intrastate rates applicable to the transportation of sand and gravel (carload) from various Illinois producing points, including those at which respondents were engaged in operations, to the Chicago (Ill.) switching district. The change was proposed to be accomplished by cancelling tariffs, rates and charges then and theretofore lawfully on file with the Illinois Commission and then legally in effect, and substituting in their place and stead the Jones tariff and rates, which latter were proposed to be made effective September 10, 1925 (R. 42, 46; Exhibits 1 and 3, R. 211-213, 216-218).

So far as here pertinent, there were two principal changes in rates proposed in the Jones tariff from respondents' plants:

First: The single lines rates were proposed to be made 3.25 cents per cwt. or 65 cents per ton. The rates contained in tariffs which the Jones schedule sought to cancel were 3 cents per cwt. or 60 cents per ton.

Second: The connecting line switching charges were proposed to be made 30 cents per ton or about $15.00 per car. The charges contained in tariffs which the Jones schedule sought to cancel ranged from $3.60 per car upward, the majority of such charges being from $3.60 to $8.50 per car (R. 42-46; Exhibits 1 and 3, R. 211-213).

The intended effect of the Jones tariff was, therefore, to obtain an increase of 5 cents per ton, or about $2.50 per car, in the single line rates, and an increase of as much as $11.40 per car in connecting line switching charges based on an average load of 50 ton per car.

Before the Jones tariff and increased rates therein contained were to become effective, however, the Illinois Commission, acting under and by virtue of the power and authority conferred upon it by Section 36 of the Illinois Act,[2] suspended the said Jones tariff and the proposed increased rates and charges, and declined to permit the same to be made effective on the date proposed, *viz.*, September 10, 1925. The suspension was accomplished by the Illinois Commission's entry of a formal order on August 29, 1925 in a proceeding entitled No. 15539, *et al., In the Matter of the Proposed Changes in Rates, etc.* By the terms and conditions of the latter and supplemental orders entered in the same cause, the Jones tariff and rates were suspended from September 10, 1925 to February 15, 1927 (R. 216-219).

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[2] Ill. Rev. Stat. 1939, Chap. 111⅔, Par. 36.

Following the suspension of the Jones tariff and rates, the Illinois Commission entered upon an investigation and hearing with reference to the lawfulness, *i.e.*, reasonableness, etc., thereof, the trial being joined with that of a complaint which had been filed in the interim, and which was entitled No. 15878, *Chicago Gravel Co.* v. *Atchison, T. & S. F. R. Co.* A final order was entered in the consolidated cause on November 30, 1926. That order, so far as it related to the Jones tariff and rates, provided:

> "We further find upon this record that the rates published by the carriers are not justified and that the tariff should be permanently cancelled and stricken from the files of the Commission". (R. 157).

Whereupon, an order accordingly was entered by the Illinois Commission (R. 147-164). The Jones schedule of increased rates and charges thus never became legally in effect on, or lawfully applicable to, intrastate traffic during the period of suspension, September 10, 1925 to February 15, 1927.

Although enjoined by the suspension order of August 29, 1925, and supplemental or re-suspension orders, from making effective and applying the Jones tariff of increased rates, which latter, as related, were ultimately rejected and condemned by the Illinois Commission as "not justified," *i.e.*, not shown to have been reasonable or otherwise lawful, petitioners, both for themselves and the connecting carriers, ignored the orders mentioned and during the period September 10, 1925 to February 15, 1927, imposed upon respondents' shipments the very rates and charges which the Illinois Commission had declined to permit them to make effective and exact (R. 42-46; Exhibits 1 and 3, R. 211-213).

Which is to state that petitioners collected upon shipments originating at respondents' plants and destined to deliveries in the Chicago (Ill.) district on petitioners' lines the suspended single line rates of 65 cents per ton, and where destined to points on connecting lines in that district, collected, as agent for the latter carriers, an additional suspended switching charge of 30 cents per ton, or a total through charge of 95 cents per ton. This represented, as previously set forth, a single line rate charge of 5 cents per ton, or about $2.50 per car in excess of the rates applicable in tariffs lawfully on file and legally in effect at the time shipments were made, and connecting line switching charges as much as $11.40 per car in excess of the legal and lawful charges (R. 42-46, 48-51, 211-213, Exhibits 1 and 3).

Petitioners admit they did not comply with the Illinois Commission's suspension orders, and that, during the period in question, they exacted the Jones schedule of rates and charges rather than those contained in tariffs lawfully on file with the Illinois Commission and the rates therein named and legally in effect (R. 9, 227).

Thereafter, to-wit, on September 21, 1928, respondents, eight in number, and who are producers of sand and gravel with plants located in Illinois on the lines of the petitioners within a radius of fifty miles of the Chicago (Ill.) district,[3] filed a joint and several complaint with the Illinois Commission. The subject matter of that complaint and the issue presented are described *supra,* pp. 5, 6.

[3] Respondents' plants are situate within what in the tariffs is referred to as the "inner zone" or "Zone I". Those terms, interchangeably employed, are used to describe all producing points situate 0-50 miles distant from the Chicago District. The "outer zone" or "Zone II" embraces producing points 51-100 miles distant from the Chicago District (R. 41; Exhibit 4, R. 51, 126, 127).

It may here be repeated, however, that the theory of the complaint was that under the terms of Section 36 of the Illinois Act[4] and the Illinois Commission's suspension orders, the Jones tariff and rates it contained did not, during the period involved, become legally or lawfully applicable, that hence the exaction of said rates was illegal, and, that under the mandate of Section 37 of the Illinois Act,[5] the tariffs and rates which the Jones tariff unsuccessfully sought to cancel remained and continued in effect and constituted the sole and only rates legally applicable (R. 42, 43, 44, 45). The burden of the complaint was that respondents had been "overcharged" on their shipments and the issue was simply whether the rates contained in tariffs lawfully on file with the Illinois Commission and legally in effect had been applied by petitioners. The damages respondents sought were merely return of the amount by which they had been "overcharged" (R. 28-29).

Answering the complaint, petitioners and other defendant carriers in the action before the Illinois Commission, first admitted the jurisdiction of that Commission over both the subject matter and the therein defendants, but otherwise made a general denial (R. 29). Later, an amended answer and motion to dismiss was filed. The latter, strictly affirmative in character, alleged, in substance, (1) that the same issues as presently in controversy had been resolved adversely to respondents in a proceeding known as Ill. No. 15878, and the *Chicago Graval Co. case,* and (2) that a fixed relationship of rates of the specific measure stated in the Jones schedule, or resulting from the claimed relationship, had been prescribed between the intrastate points involved in an order entered

[4] Ill. Rev. Stat. 1939, Chap. 111⅔, Par. 36.
[5] Ill. Rev. Stat. 1939, Chap. 111⅔, Par. 37.

by the Interstate Commission in a proceeding described as *Chicago Sand & Gravel Producers* v. *Director General,* 64 I. C. C. 37, and that petitioners were enjoined by law to conform to the alleged requirements of the order in the said cause. In the first instance, which was not decided by the Illinois Commission (R. 16-17), the plea was *res adjudicata,* and in the second, that the Illinois Commission was without jurisdiction in the premises, which latter issue was the only thing decided by the State tribunal (R. 29-32, 16-17).

By way of replication, respondents traversed petitioners' amended answer and motion to dismiss in all respects, thereby putting them on strict proof (R. 32-35).

The complaint ultimately came on for trial before the Illinois Commission on February 23, 1932 (R. 40).

To maintain the issue in their behalf, respondents, among other things, (*a*) introduced in evidence the Illinois Commission's suspension orders showing the suspension of the Jones tariff and rates it contained and the final and later rejection and condemnation thereof by the said Commission—in short, established that the said tariff and rates had never become legally in effect or applicable to respondents' traffic; (*b*) submitted in evidence the Illinois tariffs which the Jones schedule proposed to cancel, and which former tariffs contained the rates and charges legally on file with the Commission, and in effect at the time respondents' shipments moved; (*c*) established that the single line rates contained in said latter tariffs were 60 cents per ton, and that the connecting line switching charges similarly contained in said tariffs were $3.60 per car upward; (*d*) established generally that shipments had been made as alleged, and that the Jones tariff rates and charges rather than those

legally in effect, as related, had been exacted thereon. Following a customary practice before the Illinois Commission, details as to the number of shipments, the total tonnage involved, the total amount of damages or overcharges and the paying and bearing of said illegal rates in each instance were, by agreement, reserved pending determination of the geenral issue (R. 201, 206, 211-213, 42-45, 47-53; Exhibits 1 and 3).

Although petitioners in their amended answer and motion to dismiss premised their plea to the jurisdiction of the Illinois Commission and in that regard their defense to respondents' complaint upon the alleged fact and requirements of an order entered by the Interstate Commission in the *Chicago Producers case*, they did not submit such an order in evidence or otherwise establish that there had been an order entered having the legal effect and result attributed to it. The purpose of pleadings being merely to lay a basis for the introduction of evidence, the failure of petitioners to introduce the report and order upon which their defense rested, on the occasion of trial before the Commission, constituted, as the Supreme Court of Illinois in effect said (R. 232, 233, 227), an abandonment of the plea. Hence no issue as to the requirements, if any, of the *Chicago Producers case* was, in fact, before either the Illinois Commission, the Circuit Court of Cook County, or the Supreme Court of Illinois, nor is such an issue before this Court (R. 232, 233).

Petitioners, who called no witnesses, presented the following evidence in the trial before the Illinois Commission: 1. The report of the Interstate Commission in the *Chicago Gravel Co. case* (Ex. 4, R. 51, 92-134). 2. An order of the Illinois Commission in No. 15878 (Ex. 5; R. 51, 134-146). 3. The order of the Illinois Commission in

Docket No. 15539 *et al.* (Ex. 6; R. 51, 147-164). 4. An order of the Illinois Commission in No. 10666, *Chicago Sand & Gravel Producers* v. *Atchison, T. & S. F. R. Co.* (Ex. 7; R. 52, 165-196). Petitioners did not plea, however, that any of the preceding decisions or orders *per se* prescribed intrastate rates from respondents' plants for the period here involved or prior thereto, nor that the Jones tariff rates were responsive to any order entered in the said proceedings, nor that in any of the said decisions it had been held or decided, responsive to any issue presented in those cases, that the Illinois Commission was without jurisdiction of the issue of respondents' complaint (R. 29-32).

The use which petitioners sought to make of said decisions, in the action before the Illinois Commission, was an endeavor to prove by *obiter* remarks appearing therein what had been decided and the legal effect of the *Chicago Producers case,* which was not introduced in evidence and was never before either the Illinois Commission, the Circuit Court of Cook County, or the Supreme Court of Illinois. But in the Supreme Court of Illinois petitioners sought (R. 222) and here seek (Pet. p. 55) to advance the proposition that the rates exacted were reasonable and that petitioners should, therefore, be permitted to retain them. In the final analysis petitioners' position thus was, not a jurisdictional plea, but rather a legal proposition, that if a rate has been prescribed by a commission, it may be imposed irrespective of whether it has been published in a tariff which has become lawfully and legally in effect and in total disregard of the fact that tariffs and rates lawfully on file have not been superseded or cancelled.

On January 4, 1933, the Illinois Commission entered its order in the premises. In that order the Commission summarily dismissed respondents' complaint on the

grounds (*a*) that the Interstate Commission had jurisdiction of the subject matter thereof, and (*b*) that hence the Illinois Commission was without jurisdiction (R. 17). No findings whatever were made by the Illinois Commission showing or even pretending to show from the *Chicago Producers case*, that the Interstate Commission had therein or in any other proceeding prescribed or required the rates and charges published by petitioners in the Jones tariff and exacted from respondents (R. 11-13).

Nor did the Illinois Commission find that the single line rates of 60 cents per ton and the connecting line charges of $3.60 per car upward, the same being those which respondents alleged were legally applicable, had been found by the Interstate Commission in any proceeding to be, for the period involved or prior thereto, unduly prejudicial to shippers in interstate commerce or to constitute an unjust discrimination against or burden upon interstate commerce. Nor did the Commission consider or determine the issue of respondents' complaint, *i.e.*, whether the Jones tariff rates became lawfully in effect or whether illegal rates had been imposed or what the legal rates were as shown by tariffs lawfully on file with it and in effect at the time (R. 2-17).

And the Illinois Commission's order and its disclaimer of jurisdiction was not, in fact, even premised upon the *Chicago Producers case* or any stated requirement thereof, but rested instead upon *quotations* and *dicta* culled from the report of the Interstate Commission in the *Chicago Gravel Co. case* and the order in Ill. No. 10666, in neither of which cases, as the Supreme Court of Illinois remarked (R. 233), was the issue presented by respondents' complaint even remotely involved or decided (R. 10-13, 14-17, 51, 92-134, 52, 165-196; Exhibits 4, 7).

Following the Illinois Commission's denial of respondents' petition for rehearing, in which error was alleged that the order was not based upon competent evidence, that it was contrary to the evidence and not supported by substantial evidence, that it was contrary to the evidence and the law, that the rates in issue were illegal and violative of law, *i.e.*, that the order was unresponsive to the issue of the complaint, that the Commission should have found in respondents' favor, and, that in failing to do so the findings made by the Commission were incompetent to sustain its order (R. 88-90), an appeal was taken to the Circuit Court of Cook County, Illinois. The latter Court, for substantially the same reasons referred to in the opinion of the Supreme Court of Illinois, held the Commission's order void, and reversed and remanded it with directions (R. 202-204).

Decision of the Supreme Court of Illinois.

In affirming the judgment and order of the Circuit Court, the Supreme Court of Illinois held (1) that the order of the Illinois Commission was invalid and void by reason (*a*) of the failure of the Commission to make requisite findings as required by law, and (*b*) that the basis and premises upon which the order otherwise rested were as a matter of law and fact incompetent to sustain it; (2) that the Illinois Commission clearly had jurisdiction of respondents' complaint, that the Jones tariff rates and charges during the period involved were, as a matter of law and upon the undisputed evidence of record, inapplicable and illegal, the Court holding that as a result of the suspension orders entered by the Commission the said Jones tariff rates had never become lawfully or legally in effect on intrastate traffic during the said period and

that the Commission should have so found, whereupon the Court, by way of affirming the order of the Circuit Court, remanded the Commission's order with the directions to it to hold a further hearing consistent with the Court's findings and determine the amount of the damages or overcharges (R. 234-235). Or, in the words of the Circuit Court, that the order should be "remanded to said Commission for further proceedings in accordance with law" (R. 204).

The Supreme Court of Illinois' finding respecting the invalidity of the Illinois Commission's order because of the absence of requisite findings was premised on the ground that Section 65 of the Illinois Act,[6] specifically required that the Commission make essential findings of fact, that such findings were jurisdictional and conditioned the power and authority of the Illinois Commission to act, and that the Commission was bound to conform to the Illinois law in said regard (R. 234-235).

In declaring the Illinois Commission's order void because unsupported by competent evidence, the Court held, in substance, simply that the Illinois Act[7] required the Commission to base its order on competent evidence of record, and that since the order in the *Chicago Producers case* was not in evidence, the Commission could not base its order thereon, and that, further, inasmuch as neither the *Chicago Gravel Co. case* nor Ill. No. 10666, relied upon by the Commission, and constituting the sole inducement for the order it entered, disclosed either the absence of the said Illinois Commission's jurisdiction, or that the Jones schedule of rates had been prescribed by the Interstate Commission, or that the rates respondents alleged legally

[6] Ill. Rev. Stat. 1939, Chap. 111⅔, Par. 69.
[7] Ill. Rev. Stat. 1939, Chap. 111⅔, Par. 69.

applicable had been found to be unduly prejudicial or unjustly discriminatory in respect to interstate commerce or shippers therein, the order of the Illinois Commission was not supported by either competent or substantial evidence, and was, therefore, "arbitrary and unreasonable in the extreme and is void" (R. 232-233, 235).

In holding that the rates and charges of which respondents complained were illegal and that the Illinois Commission should have so found, the Court said, in effect, that, as previously indicated, the Jones tariff and rates did not become legally applicable or in effect, that the suspension orders of the Illinois Commission itself conclusively demonstrated that fact, that Section 37 of the Illinois Act,[8] required that tariffs, rates and charges lawfully on file with the Commission and legally in effect at the time shipments moved should be observed, that the Commission had no discretion but to enforce the mandate of the statute in said particular, and that since it was admitted by petitioners and otherwise established of record that the Jones tariff rates were not legally applicable on intrastate traffic during the period involved, it resulted that the rates and charges contained in tariffs filed pursuant to requirements of Section 33 of the Illinois Act[9] were thus, as a matter of law, legally applicable, and that the Illinois Commission was accordingly bound to conform its action to the evidence and the law in this latter regard (R. 236, 227, 231).

The "issue presented to the commission," observed the Court, "was simply whether the correct and legal tariff rate had been applied" (R. 231). The Court, thereupon, directing its remarks to that issue, considered the legal

[8] Ill. Rev. Stat. 1939, Chap. 111⅔, Par. 37.
[9] Ill. Rev. Stat. 1939, Chap. 111⅔, Par. 33.

effect of the evidence and to what relief respondents were affirmatively entitled, and, thereafter, declared the law of the case, its judgment in that regard being premised upon the proof of record and the requirements of the Illinois Act in relation thereto. In short, the Court held that affirmatively the issue was controlled by local law and practice and that the Illinois Commission was bound to observe and give effect to the mandates of the applicable laws of Illinois (R. 227, 226, 236).

The Court gave very careful consideration, as its opinion abundantly evidences, to petitioners' contentions, most of which are renewed here, and found them untenable. In rejecting such contentions the Court, among other things, held that the question of the inherent reasonablenss of rates involved was not open to review since no issue was before the Illinois Commission in that regard or decided by either the latter or the Circuit Court (R. 226, 227, 230, 231, 233); that the question of whether the issue of the present action had been decided adversely to respondents by the Illinois Commission in Ill. No. 15878 was not decided by the Commission in the order under review or by the Circuit Court in the instant litigation and was hence not now open to review (R. 236); the Supreme Court of Illinois stated, however, that the rule of *res adjudicata* was not applicable to administrative agencies (R. 236) and that, in any event, Ill. No. 15878 did not decide the issue of respondents' complaint (R. 233); that the entry of an order in the *Chicago Producers case* or any requirements thereof could not be proved by extraneous remarks from the *Chicago Gravel Co. case* or Ill. No. 10666 (R. 233); that the jurisdiction of the Illinois Commission could not be defeated by mere claims, admissions, or self-serving declarations (R. 235); and then, after reviewing the

authority of the Interstate Commission in respect of intrastate rates (R. 231-232), the Court stated that no issue was presented as to the "paramount authority of the Interstate Commerce Commission to regulate the relationship between interstate and intrastate rates" (R. 232), whereupon the Court declined to construe any order of the Interstate Commission of record, or otherwise, declaring that such considerations did not relate to the "decisive question" presented (R. 235). Respondents distinguish between the basis of the Courts' judgment and the mere rejection of petitioners' contentions.

No judgment or order has been entered by the Supreme Court of Illinois requiring petitioners to pay damages in any specified amount. Nor does the Court's opinion require the Illinois Commission to enter an order requiring payment of any specified amount named in the opinion of the former. On the contrary, the judgment requires *further proceedings* before the Illinois Commission with the amount of damages left open, and contingent, of course, upon respondents' establishing by competent proof the extent and number of shipments made by them, and that in each instance they paid and bore charges exacted thereon which showing would be necessary (*Post*, pp. 29-36) to entitle them to damages (R. 225-237, 49, 53).

The Decisions of the Interstate Commission and Illinois Commission Upon Which Petitioners Rely.

As already stated, petitioners in the action before the Illinois Commission, on appeal to the Supreme Court of Illinois, and before this Court, relied and rely, respectively, not upon the *Chicago Producers case* which they pled as a defense, but rather upon reports and orders in the *Chicago*

Gravel Co. case, 118 I. C. C. 633, and Ill. Nos. 10666 and 15878 (Pet. pp. 2-8; R. 2-18, 51-52, 92-196, 225-237; Exhibits 4, 6, 7). No issue was before the Interstate Commission in the *Chicago Gravel Co. case* respecting the jurisdiction of the Illinois Commission to resolve the question of illegality of rates to which respondents' complaint appertains (R. 92-96, 123-125). Nor did Ill. No. 10666 or No. 15878 concern or decide any such issue (R. 165-166, 192-195, 147, 149, 156-157).

In the *Chicago Gravel Co. case* the Interstate Commission affirmatively did nothing more than prescribe and order *interstate* rates for the future, that is, for the period subsequent to the respondents' last cause of action—on and after February 15, 1927 (R. 132-133).[10] Ill. No. 15878 did likewise in respect of interstate rates (R. 157-158). Ill. No. 10666 concerned a complaint filed in 1920 and presented issues in relation to the reasonableness, not illegality, of rates in effect at that time. That complaint thus involved a cause of action arising about two years prior to the date of the order in the *Chicago Producers case* and about five years prior to the time of the filing of respondents' complaint herein and five years prior to the publication of the suspended Jones tariff, and consequently, on the face of the matter, dealt with different issues from those involved herein (R. 165). There was thus no occasion for the Supreme Court of Illinois to construe the orders mentioned in relation to petitioners claims of conflict between decisions of the State and Federal commissions, nor, as stated, did it do so (R. 231-233).

[10] It is true, of course, that certain extraneous statements were made in a footnote to the report by the Interstate Commission. This footnote is erroneous because of the fact that no change was made in the Inner Zone intrastate rates, and there was nothing in the interstate order from which an appeal could be taken (R. 103). The Commission also made reference to the measure of rates allegedly resulting from the **Chicago Producers case** (R. 104), but its **dicta** in the latter respect is clearly erroneous as a matter of simple arithmetic. **Post**, p. 61.

Moreover, in the *Chicago Gravel Co. case* the Interstate Commission expressly recognized the jurisdiction of the Illinois Commission in respect of intrastate rates (R. 125). And it denied that the Jones tariff intrastate rates had been prescribed by it (R. 104). And the Jones interstate connecting line switching charge of 30 cents per ton was condemned therein as unreasonable (R. 123, 124). In Ill. No. 15878 the Illinois Commission similarly denied that the Jones tariff rates had been prescribed for the period here involved (R. 152). Furthermore, the latter Commission therein declared and exercised its jurisdiction in respect of intrastate rates by prescribing rates for the future (R. 159-160). And in a companion order in No. 15539 *et al*, it exercised jurisdiction in relation to intrastate rates during the period involved in respondents' complaint by first suspending and later rejecting the Jones tariff charges (R. 157). It is also true and significant that petitioners did not challenge the authority of the Illinois Commission to deal with the Jones tariff rates in the suspension proceedings (R. 226). In other words, petitioners in the suspension proceedings admitted the jurisdiction of the Illinois Commission which they now seek to deny.

Errors in Petitioners' Statement.

While the statement of the case set forth by respondents correctly reflects the record, it will be helpful to this Court, we believe, to have specifically pointed out some of the errors and inaccuracies in petitioners' statement:

1. There is no ground whatever for petitioners' statement (Pet. pp. 1-2) that the Supreme Court of Illinois held that orders of the Interstate Commission could be defeated or set aside collaterally by state courts or that the Illinois Supreme Court did so. The Supreme Court of

Illinois did not decide any such issue, but on the contrary held that a question of that character was not before it. In that regard, the Court held, in effect, that petitioners' plea to the jurisdiction of the Illinois Commission constituted, in the first instance, an affirmative defense, which to sustain required petitioners to submit in evidence the report and order in the *Chicago Producers case*, and establish as a matter of fact and law that they had the legal effect and result attributed to them (R. 231-233, 235). Of course, as previously stated, the Court later held that the ultimate issue could not be controlled by any requirement of the Interstate Commission. *Ante*, p. 19. In short, what petitioners complain of in the opinion of the Court does not, as they represent, constitute the basis of the Court's decision, but amounts rather to the rejection of petitioners' contentions, all of which is a matter of practice and procedure.

2. The joint hearing held by the Interstate Commission and the Illinois Commission in the *Chicago Gravel Co. case* and Ill. No. 15878 (Exhibits 6, 7; R. 51, 52, 147-164, 165-196) under the provision of Section 13 (3) of the Interstate Act did not, as petitioners infer (Pet. pp. 1-2, 13, 21), relate to the issue of respondents' complaint in the instant proceeding (R. 147-157; Exhibit 4, R. 51, 92, 95). Furthermore, Section 13 (3) of the Interstate Act[11] confers no jurisdiction or power upon the Interstate Commission to hold a joint hearing with a state commission in respect of any issue before the latter relating to illegality of intrastate rates or over-charges on intrastate traffic arising from the failure to properly apply intrastate tariffs. These questions are within the exclusive competence of the state to determine. Moreover, any act of the Interstate Commerce Commission under Section 13 (3) must be coupled with further action under Section 13 (4), which is absent in this case.

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[11] C. 104, 24 Stat. 383, U. S. C. A. Title 49, 13 (3), 13 (4).

3. There is no basis in fact for petitioners' statement (Pet. p. 4) as to the requirements of the *Chicago Producers case.* Neither the report nor order therein was a matter of evidence and no provision or requirement of the Interstate Commission therein was established of record. Hence the Supreme Court of Illinois did not construe said case or determine its legal effect (R. 228-229, 232, 233). The Court especially stated:

> "No question is presented as to the paramount authority of the Interstate Commerce Commission to regulate the relationship between interstate and intrastate rates." (R. 232).

4. As elsewhere noted, *ante,* pp. 16, 18, 20, 22, neither the order in the *Chicago Gravel Co. case* or Ill. No. 15878 (Pet. pp. 2-3) concerned or decided any jurisdictional issue of respondents' complaint here adversely to them, for no such issue was before either of the tribunals in the cases cited (R. 92-134, 165-196).

5. Nor did the complaint in Ill. No. 15878, (Exhibit 6, R. 51, 147-164) as petitioners represent (Pet. p. 3), present the same issue as the complaint in the present action (R. 149, 156). In its order responsive to the complaint in No. 15878 (Exhibit 6; R. 51, 147-164), the Illinois Commission said that it was considering as the issue before it the "reasonableness" of rates in effect "for the several years last past" (R. 155), rather than the question of the illegal exaction of the Jones schedule rates, and the limited period during which they were under suspension. The Illinois Commission, moreover ,in the order in the present controversy, did not decide the issue petitioners seek to raise in this regard (R. 17), nor did the Supreme Court of Illinois decide such an issue (R. 236). Petitioners' contention in this particular is, therefore, not open to review in this Court.

6. Petitioners' repeated assertions (Pet. pp. 4 *et seq.*) as to the alleged requirements of the order in the *Chicago Producers case* are, as already intimated, nothing but their own unsupported conclusions. Petitioners do not refer this Court to any provision or requirement set forth in the report or order in the case cited sustaining the claims they make. Moreover, neither the Illinois Commission nor the Supreme Court of Illinois was referred to any provision of the report or order in the *Chicago Producers case* showing that the Federal commission had assumed jurisdiction over the rates presently involved, or had, for the period involved, prescribed the Jones tariff rates and charges exacted from respondents (Exhibits 4, 5, 6, 7; R. 51, 52, 92-196, 11-13, 233). The reliance on decision of the *Chicago Producers case* was abandoned by petitioners in the manner previously set forth, and they relied not upon it, but upon the *Chicago Gravel Co. case* and Ill. No. 10666 (Exhibits 4 and 7; R. 51-52, 92-134, 165-196), which proved nothing germane to the case (R. 233).

7. It was not admitted of record before the Illinois Commission, as petitioners infer (Pet. p. 5), that the Jones schedule of rates was prescribed by the Interstate Commission, or that in petitioners' failure to publish said rates a violation of the order in the *Chicago Producers case* would result (R. 46-47). Respondents' position was clearly that the rates and charges exacted from them were illegal, and that the Jones tariff intrastate rates and charges had never been prescribed by any Commission for the period involved, and had never become legally applicable during such period (R. 42-45).

8. Petitioner's representation (Pet. p. 6) that both the Interstate Commission and the Illinois Commission fixed a single line rate of 65 cents as reasonable for the trans-

portation of respondents' shipments during the period to which the latter's complaint appertains is not the fact. The evidence conclusively establishes (1) that in the *Chicago Gravel Co. case* the Interstate Commission prescribed rates —and only interstate rates—for the period on and subsequent to February 15, 1927 (R. 132, 211, 227); (2) that in Ill. No. 15539 (Exhibit 6; R. 51, 147-164) the Illinois Commission condemned as "not justified", *i.e.*, unreasonable, etc., single line rates of 65 cents, and the connecting line switching charge of 30 cents per ton for the period September 10, 1925 to February 15, 1927 (R. 157, 159-163); and (3) that both Commissions, in the cases cited, condemned the connecting line switching charge of 30 cents per ton as unreasonable for the future (Exhibits 6, 4; R. 51, 157, 158, 123-124).

9. There was no issue presented before the Illinois Commission, or error brought to the Supreme Court of Illinois or pled by petitioners before the Illinois Commission respecting the alleged failure of respondents (Pet. p. 7) to seek judicial review of numerous orders and decisions and it is not clear what the argument in such regard has to do with the present controversy (R. 3-5, 225-236, 29-32).

The issue before the Supreme Court of Illinois, it may be repeated, was not as to what may have been decided in some other proceeding, but whether (1) the order of the Illinois Commission was valid, and (2) if not, to what relief respondents were entitled as a mater of law, and upon the evidence of record (R. 232-236). Those were the only issues decided by the Circuit Court of Cook County, Illinois, to which the decision of the Supreme Court of Illinois was necessarily confined (R. 230).

10. The statement (Pet. p. 6) that the effect of the decision of the Supreme Court of Illinois is to afford respondents a retroactive rate advantage over other intra-

state shipments in the inner or Zone I is wholly erroneous. The Illinois Commission suspended the Jones tariff intrastate rates from all points in said zone (R. 216-219). If petitioners have exacted the Jones basis from other intrastate shippers than respondents, the former have the same remedy as respondents invoked before the Illinois Commission. Besides that, the record fails to disclose that all Illinois carriers, except petitioners, did not comply with the suspension orders of the Illinois Commission, so that the effect of petitioners' ignoring those orders and exacting the higher Jones schedule of rates was to place respondents at a single line rate disadvantage of 5 cents per ton, and connecting line switching charge disadvantage of as much as $11.40 per car in relation to the rates enjoyed by their competitors situated on other lines, but competing in a common market (R. 7, 43, 215). Aside from the foregoing, no issue was before or decided by the Supreme Court of Illinois in its decision herein in such regard.

11. Contrary to petitioners' declaration (Pet. p. 8) respondents admitted nothing in regard to and traversed the former's amended answer before the Illinois Commission in all respects (R. 32-36, 236).

12. There are other errors in petitioners' statement which are so palpable that they refute themselves. For instance, the continual reference that the Court was passing upon administrative questions resolved adversely by the two commissions in prior decisions. As we hereinafter will show, no such questions are involved in this case. There is nothing in this case except questions of law.

13. The reparation referred to by petitioners (Pet. p. 3) was based upon a claim for reparation for the differ-

ence between the legal rate of 60 cents per ton and the claimed rate of 40 cents per ton. (Appendix B to Exhibit 6; R. 51, 215). This, however, was a prayer for damages because of alleged "unreasonable" rates and not "illegal charges". The point has nothing to do with this case.

Objections to the Jurisdiction and Summary of Points Argued.

1. The judgment of the Supreme Court of Illinois does not constitute a final judgment or order upon which a writ of certiorari may isue. Petitioners have a complete and adequate remedy at law.

2. The judgment of the Supreme Court of Illinois rests exclusively on non-federal grounds. No federal question was presented or decided. Nor was a decision respecting a federal question necessary to a disposition of the litigation.

ARGUMENT.

I.

THE JUDGMENT OF THE SUPREME COURT OF ILLINOIS DOES NOT CONSTITUTE A FINAL JUDGMENT OR ORDER UPON WHICH A WRIT OF CERTIORARI MAY ISSUE. PETITIONERS HAVE A COMPLETE AND ADEQUATE REMEDY AT LAW.

Respondents respectfully submit at the outset that, wholly aside from other considerations, the petition herein does not conform to, or satisfy the requirements of, section 237 (b) of the Judicial Code, as amended by act of February 13, 1925, 43 Stat. 936, 937 (28 U. S. C. A. sec. 344). Among other things, the latter provides that primarily and in the first instance there must be a "final" judicial order or judgment before the jurisdiction of this Court to issue a writ of certiorari may be invoked. The judgment of the Supreme Court of Illinois herein does not constitute such a "final" order or judgment—no judgment or decree for the payment of damages in any specific or named sum has been entered. In an ultimate or conclusive view, therefore, petitioners are not confronted with any requirement which presently subjects them to injury. A concomitant of the proposition stated is that petitioners have, or, if ultimately subjected to any adverse order or judgment will have, a complete and adequate remedy at law.

THE JUDGMENT IS NOT A FINAL JUDGMENT.

In reviewing the order of the Circuit Court of Cook County, Illinois, and in connection therewith the order of the Illinois Commission, the Supreme Court of Illinois addressed its decision to two principal propositions or considerations:

1. It determined the validity of the Commission's order as it dismissed respondents' complaint, the necessary result of the Court's conclusion in that regard being the remanding of the cause for further proceedings (R. 233-234, 235).

2. It resolved the question of law presented, determined the legal effect of the evidence, remanded with directions to the Commission to observe its findings in such particulars and, in a *further proceeding,* determine the amount of damages, if any, to which respondents, upon the establishing of their legal rights in the latter regard, would be affirmatively entitled under the law of the case (R. 227, 236, 237).

The action of the Court in the first instance does not, in contemplation of law, subject petitioners to any prejudicial or adverse requirement or order in any final or ultimate sense. Nor is the action of the Illinois Court in that regard open to review in this Court.

In essential respects, the setting aside of or holding void and merely remanding an order of a state commerce commission agency resembles a situation where, in an action at law for example, a new trial may be granted by the trial court, or, where on appeal, a state supreme court sets aside and reverses a judgment of a lower court and remands for

a new trial or further proceedings. The general rule is that the granting of a new trial by the trial court does not *per se* constitute a final order or an appealable issue, which is similarly the case where a state appellate court reverses and remands without requiring the entry of any final judgment or order of a definite, conclusive, or terminating character. *Ark. Valley Land & Cattle Co.* v. *Mann*, 130 U. S. 69; *Phillips* v. *Negley*, 117 U. S. 665; *Wilson* v. *Moore*, 16 U. S. (3 Wheat.) 433; *Cal. Nat. Bank* v. *Stateler*, 171 U. S. 447; *Schlosser* v. *Hemphill*, 198 U. S. 173. A like conclusion, it is submitted, is proper in respect of the action of the Supreme Court of Illinois affirming the order of the Circuit Court so far as the latter sets aside and merely remands the order of the Illinois Commission and the point need not be further considered.

In the second instance, which is presently the more important, the Court, after first declaring the Illinois Commission had jurisdiction in the premises, held that upon the evidence before the Commission, the Jones rates and charges were, as a matter of law, illegal, that the tariff and rates which the Jones schedule sought to cancel were legally applicable, and, by way of affirming the order of the Circuit Court, not only remanded but returned the cause to the Commission with directions to give effect to the Court's findings and hold a further hearing in relation to the question of damages and respondents' legal rights thereto (R. 236-237). While the decision of the Court upon the evidence and pleadings before it quite clearly constitutes the law of the case, it is equally manifest that the Court has entered no judgment or decree for the payment by petitioners of any fixed or specified damages, or amount of money, nor has it in fact or law required the entry of any such order (R. 236-237).

The question of damages and the amount thereof is expressly left open by the Court's decision. The judgment is not final in that regard. For to say that the Court determined the general issue of the controversy on its merits and held that thereunder respondents would be entitled to restitution does not mean that the latter have been awarded damages or that the Illinois Commission is given an absolute mandate to award restitution. While, in other words, respondents could not recover unless the general issue was resolved in their favor, it is also true that, even though the general issue was so determined, they still could not prevail until they established that they paid and bore the illegal charges. If, as to each shipment made, they did not show that, in fact or law, they themselves had sustained the injury of the illegal exaction of the rates in question, respondents could not prevail. *Cf. Spiller* v. *Atchison, T. & S. F. R. Co.*, 253 U. S. 117; *Southern Pacific C.* v. *Darnell-Taenzer Lumber Co.*, 245 U. S. 531; *Louisville & N. R. Co.* v. *Sloss-Sheffield S. & I. Co.*, 269 U. S. 217; *Adams* v. *Mills*, 286 U. S. 397.

A further hearing is to be held by the Illinois Commission in the foregoing regard. Respondents on that occasion are to present proof of their paying and bearing the illegal charges, the number of shipments made, the total tonnage thereof, and, based thereupon, the total amount of overcharges exacted.[12] The Illinois Commission, on a further hearing, would be bound to hold that the Jones tariff rates were illegal and lower rates legal during the period involved, but the question of respondents' right to restitution and the amount thereof is left open to the Com-

[12] Only a general showing of shipments was presented to the Commission. Details as to the number of shipments, tonnage, etc., and respondents' paying and bearing of illegal charges in each instance, conditioning their right to damages, reserved pending determination of the general issue before the Commission (R. 47, 53).

mission, in relation to which it may exercise its own discretion and independent judgment.

Presumably, satisfactory proof having been submitted by respondents in the preceding particulars on a further hearing and the record on a new trial otherwise remaining as at present, the Illinois Commission would enter an order awarding damages. That, however, has not occurred.

We say damages would "presumably" be awarded for the reason it is conceivable that respondents might fail in their proof.

Again, it is possible, though admittedly not probable, that petitioners would not proceed further with the litigation. It is hence patent that in the aforesaid respects the final or ultimate result or effect of the judgment of the Supreme Court of Illinois, so far as damages are concerned, is purely a matter of speculation and conjecture.[13]

The question is, then, whether an order or judgment which declares the law of the case and remands with directions accordingly constitutes a "final" decree or order contemplated by Section 237 (b) of the Judicial Code. This Court has consistently held that it does not.

In *Bruce* v. *Tobin,* 245 U. S. 18, it was thus stated (pp. 19, 20):

> "It may be indeed said that although the case was remanded by the court below for a new trial, the action of the court was in a sense final because it determined the ultimate right of the father to recover and the

[13] Unless and until petitioners are confronted with a judicial order for payment of damages, it would appear that argument as to the final and injurious effect of the Illinois Court's opinion is both premature and academic. **Post,** pp. 34-36.

general principles by which that right was to be measured. But that contention is not open, as it was settled under [sec.] 709, Rev. Stat. [sec.] 237, Judicial Code, that the finality contemplated was to be determined by the face of the record and the formal character of the judgment rendered,—a principle which excluded all conception of finality for the purpose of review in a judgment like that below rendered. *Haseltine* v. *Central Nat. Bank,* 183 U. S. 130, 46 L. ed. 117 22 Sup. Ct. Rep. 49; *Schlosser* v. *Hemphill,* 198 U. S. 173, 49 L. ed. 1000, 25 Sup. Ct. Rep. 654; *Louisiana Nav. Co.* v. *Oyster Commission,* 226 (20) U. S. 99, 57 L. ed. 138, 33 Sup. Ct. Rep. 78; *Coe* v. *Armour Fertilizer Works,* 237 U. S. 413, 418, 419, 59 L. ed. 1027, 1029, 1030, 35 Sup. Ct. Rep. 625.

"There being, then, no final judgment within the contemplation of the Act of 1916, the petition for a writ of certiorari is denied."

Schlosser v. *Hemphill,* 198 U. S. 173 is to the same effect. Therein it was declared (p. 176):

"Doubtless the conclusions arrived at by the state supreme court, and expressed in its opinion, furnish the grounds on which the court below must proceed when the case goes to a decree there, if no change in pleadings or proof takes place, but we cannot say what action might nevertheless be taken, and as no decree was entered in the supreme court * * * we think the writ of error cannot be maintained."

To the same effect: *George, R. etc. Co.* v. *Decatur,* 262 U. S. 432; *American Steel Foundries* v. *Whitehead,* 256 U. S. 40; *Simmons Co.* v. *Grier Bros. Co.,* 258 U. S. 82; *Wilshire Oil Co.* v. *U. S.,* 295 U. S. 100; *Washington* v. *Superior Court,* 243 U. S. 251; *Laclede Gas Company* v. *Public Utilities Comm.,* 304 U. S. 398; *County of St. Clair* v. *Lovingston,* 18 Wall. 628.

The soundness of the rule established in the preceding cases in relation to the case at bar may be easily demonstrated. Even if it be assumed that the Supreme Court of Illinois has affirmatively required entry of a final order by the Illinois Commission, and that the measure and amount of damages is ascertainable from the Court's opinion in relation to the record before it, with the result of leaving the Commission no discretion upon a further hearing but to simply perform a ministerial act, the only legal effect of the action of the Supreme Court of Illinois is to require the entry of a quasi-judicial order which itself is neither final nor appealable.

The latter is so for the reason that an award of damages by a commerce commission is not a "final" judicial determination or judgment. Section 237 (b) of the Judicial Code patently comprehends a "final" judicial order or judgment. But an award by a commission and the order by which it is entered is merely *prima facie* evidence. Both the *Interstate Act*[14] and the *Illinois Act*[15] so provide. Those Acts also provide that if an order of a commission awarding damages is not voluntarily complied with, the parties in whose favor the award runs can recover only by bringing an action at law. In other words, an order awarding damages does not in law or in a legal view subject a defendant carrier to any judicial mandate or command to which it must absolutely respond or in relation to which there may be execution or levy. *Terminal R. R. Assn.* v. *Utilities Comm.*, 304 Ill. 312, 136 N. E. 797; *Meeker* v. *Lehigh Valley R. Co.*, 236 U. S. 412; *Southern R. Co.* v. *St. Louis Hay Co.*, 214 U. S. 297; *Penn. R. Co.* v. *Jacoby & Co.*, 242 U. S. 89; *Penn. R. Co.* v. *Weber*, 257 U. S. 85.

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[14] C. 91, Sec. 424, 41 Stat. 491, U. S. C. A. Title 49, Sec. 16, Par. 2.
[15] Ill. Rev. Stat. 1939, Chap. 111⅔, Par. 76, Sec. 72.

Since, then, in the view most favorable to petitioners, the Supreme Court of Illinois has done no more than require the entry of an order by the Illinois Commerce Commission having only *prima facie* evidential character, it inexorably results that no final judicial order or mandate has been entered—no more, in other words, can be imputed to the decision of the Supreme Court of Illinois than that which results therefrom so far as any final or ultimate mandate or decree is concerned. Stated otherwise, it follows as a necessary consequence that inasmuch as the order the commission is required to enter is not final or appealable, the action of the Supreme Court of Illinois in that particular could have no different legal efficacy than what it ordered. Which proposition means simply that if the order which is responsive to the decision of the Supreme Court of Illinois is not appealable, the action of that Court by which such an order results is also not appealable or presently subject to judicial review by this Court.

Finally, there is another consideration disclosing the absence of finality to the judgment of the Illinois Supreme Court. Should this Court grant a *writ of certiorari* herein, consider the controversy upon its merits, and affirm the judgment of the Supreme Court of Illinois, its action in so doing would not be final or terminate the litigation. It would, in that event, still remain for the Illinois Commission to hold a further hearing in relation to the question of damages. And when and if that Commission entered such an order petitioners could try every error they bring now anew and presumably prosecute the litigation to this Court again. *Cf. Meeker* v. *Lehigh Valley R. Co.*, 236 U. S. 412; *Washington* v. *Superior Court*, 243 U. S. 25.

In brief, the judgment of the Supreme Court of Illinois is shown in the latter regard to be not final by the fact that petitioners have, or if ultimately subjected to an adverse order will have, a complete and adequate remedy at law. We briefly consider the latter question.

Petitioners Have an Adequate Remedy at Law.

As stated, there are to be further proceedings before the Illinois Commission. If on that occasion the Commission enters an order awarding damages, petitioners may, as elsewhere noted, decline to voluntarily comply therewith, and force respondents to an action at law to recover. In such an action the trial would be *de novo*. *Western, N. Y. & P. R. Co.* v. *Penn. Refinery Co.*, 209 U. S. 208; *Spiller* v. *Atchison, T. & S. F. R. Co.*, 253 U. S. 117. The fact that proceedings in court would be *de novo* means that despite a decision of this Court on the merits of the case affirming the action of the Supreme Court of Illinois here, petitioners, in a suit by respondents to recover based on the Commission's order awarding damages, could there interpose most, if not all, of the objections they urge now, and other defenses which might be available and tenable. The method outlined, *i.e.*, waiting until respondents bring an action at law to obtain damages after the Commission enters an order in that regard, is, in fact, the only way in which there can be a judicial determination on the question of damages, and a final and appealable judicial order or judgment entered awarding damages. Both of the considerations which would result in the latter instance are lacking here. *Terminal R. R. Assn.* v. *Utilities Commission*, 304 Ill. 312, 136 N. E. 797; *Meeker* v. *Lehigh Valley R. Co.*, 236 U. S. 412; *Southern R. Co.* v. *St. Louis Hay Co.*, 214 U. S. 297; *Penn. R. Co.* v. *Jacoby & Co.*, 242

U. S. 89; C. 91, Sec. 424, 41 Stat. 491, 49 U. S. C. A., Sec. 16 (2); Ill. Rev. Stat. 1939, Chap. 111 2/3, Par. 76, Sec. 72.

The procedure described rather than that petitioners here seek to pursue, is that ordinarily followed, and from the standpoint of judicial review it is only after a Court order awarding damages is entered that errors of the character presently advanced by the petitioners are triable. For, as a three-judge statutory Court well said in *Brady* v. *Interstate Commerce Commission*, 43 Fed. (2d) 847, if a commission enters an order awarding damages and no suit is brought thereon, the order "amounts to nothing and could not, of course, be the cause of irreparable injury. * * *"

It would appear, then, both that no basis exists upon which, in the first and primary instance, a *writ of certiorari* may issue, and that petitioners have misconceived their remedy in here and at this time seeking review by *writ of certiorari.*

II.

THE JUDGMENT OF THE SUPREME COURT OF ILLINOIS RESTS EXCLUSIVELY ON NON-FEDERAL GROUNDS. NO FEDERAL QUESTION WAS PRESENTED OR DECIDED. NOR WAS A DECISION RESPECTING A FEDERAL QUESTION NECESSARY TO THE DISPOSITION OF THE LITIGATION.

There are other fundamental objections to the jurisdiction of this Court in the premises, and they may be briefly summarized as follows:

1. The judgment of the Supreme Court of Illinois rests exclusively on local law and practice, and thus on non-federal grounds.

2. The Supreme Court of Illinois decided no question of federal law, and none was before it.

3. The judgment rests upon grounds independent of any question of federal import.

4. A ruling upon federal questions was not necessary or essential to the decision reached by the Supreme Court of Illinois.

5. If the Supreme Court of Illinois construed, rather than merely applied, any statute, it was a state act, and, in matters of the character here involved, the construction thereof presents no federal question.

6. In declaring the law of the case and remanding the cause to the Illinois Commission with directions to give effect to its findings, the Supreme Court of Illinois merely applied local law and determined the legal effect of the evidence, all being matters not open to review in this Court.

7. On the merits, there is an absence of substance to petitioners' claims respecting the lack of jurisdiction of the Illinois Commission and the alleged error by the Supreme Court of Illinois in its ruling in said regard.

The Basis of the Supreme Court of Illinois' Judgment.

It is elementary that the jurisdiction of this Court herein must turn upon and be resolved not by the mere claims of petitioners, but rather by what the judgment of the Supreme Court of Illinois itself discloses was decided, and the basis upon which the decision rests. *Cf. Minneapolis & St. P. R. Co.* v. *P. & P. U. R. Co.*, 270 U. S. 480; *Millinger* v. *Hartupee*, 73 U. S. 258; *U. S. Fidelity & Guarantee Co.* v. *State of Oklahoma*, 250 U. S. 111. And this Court will readily recognize the familiar rule that in

a broad and fundamental sense the question presented on an appeal from an order of an administrative agency is, first, the lawfulness of the order, and, second, where the issue otherwise involved is one of law, what the correct rule of law is and the legal rights of the litigants thereunder in relation to the pleadings, which, in the present action, are premised upon the provisions of the Illinois Act.

We have already suggested (*ante*, p. 29) that the judgment conveniently divides itself into two parts: 1. That part which holds invalid and void the order of the Illinois Commission. 2. That part which decides the law of the case, and remands the cause with directions.

First: The order of the Illinois Commission was held invalid on two grounds, to-wit, that the Commission failed to make essential findings as required by Illinois law, and, that the "evidence" upon which the Commission relied was incompetent to sustain its order.

In respect of the fatal absence of essential findings, the key to what the Supreme Court of Illinois held is found in the following language appearing in the opinion (R. 234-235):

> "Section 65 of the Public Utilities act requires the Commerce Commission, at the conclusion of a hearing upon any complaint, to make and render findings concerning the subject matter and facts inquired into and enter its order based thereon. This court has on numerous occasions announced that the findings of the Commerce Commission under section 65 must be sufficiently specific to enable an intelligent review of the commissions' decision and to ascertain whether the facts, as found, afford a reasonable basis for the order entered. * * * When an administrative agency is required, as a condition precedent to an order, to

> make a finding of facts, the validity of the order must rest upon the needed finding. Where lacking, the order, it follows necessarily, is ineffective. * * * The order in this proceeding does not contain a single statement from the decision and order in the Interstate Commerce Commission proceeding which it holds to be determinative of the controlling issue here involved. Moreover, the record is silent in this respect. An examination of the order simply fails to show the action taken by the Interstate Commerce Commission with respect to the intrastate rates, the subject matter of the complaint. * * * in consequence, the findings of the Illinois Commission are wholly inadequate to support its conclusion that it lacked jurisdiction to grant the relief sought."

Section 65 of the Illinois Act[16] imposes an absolute mandate upon the Illinois Commission to make findings which support its ultimate conclusions. Such findings are jurisdictional in character, and in the absence or inadequacy of the same, the Commission has no jurisdiction or authority to enter an order. Thus, in declaring the order void on the grounds stated, the Supreme Court of Illinois merely held that the Illinois Commission was obliged to conform to the requirements of the Illinois Act respecting findings, and that in its failure to do so, its action in dismissing respondents' complaint could not be sustained. The Illinois Court's conclusion was manifestly premised on local law and practice, and this Court will neither review the facts *per se* upon the basis of which the Supreme Court of Illinois reached its conclusion nor the application it required nor the construction it gave to the Illinois Act in the aforesaid regard. *Cf. United States* v. *Johnson,* 268 U. S. 220; *King* v. *West Virginia,* 216 U. S. 92; *Christman* v. *Miller,* 107 U. S. 313; *post,* pp. 47-58.

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[16] Ill. Rev. Stat. 1939, Chap. 111⅔, Par. 69.

Moreover, the conclusion reached by the Supreme Court of Illinois follows the decisions of this Court on the subject. In *Wichita, R. & Light Co.* v. *Utilities Commission,* 260 U. S. 48, it was said (pp. 58-59):

> "This conclusion accords with the construction put upon similar statutes in other States. *Public Utilities Commission* v. *Springfield Gas & Electric Co.,* 291 Ill. 209; *Public Utilities Commission* v. *Baltimore & Ohio Southwestern R. R. Co.,* 281 Ill. 405. Moreover, it accords with general principles of constitutional government. The maxim that a legislature may not delegate legislative power has some qualifications, as in the creation of municipalities, and also in the creation of administrative boards to apply to the myriad details of rate schedules the regulatory police power of the State. The latter qualification is made necessary in order that the legislative power may be effectively exercised. In creating such an administrative agency the legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function. It is a wholesome and necessary principle that such an agency must pursue the procedure and rules enjoined and show a substantial compliance therewith to give validity to its action. *When, therefore, such an administrative agency is required as a condition precedent to an order, to make a finding of facts, the validity of the order must rest upon the needed finding. If it is lacking, the order is ineffective.*" (Italics ours.)

See also: *United States* v. *Baltimore & O. R. Co.,* 293 U. S. 454; *Florida* v. *United States,* 282 U. S. 194; *United States* v. *Chicago, M. & St. P. R. Co.,* 294 U. S. 499; *Atchison, T. & S. F. R. Co.* v. *United States,* 295 U. S. 193.

The Illinois Act also requires (*a*) that an order of the Illinois Commission shall be based upon "the subject-

matter and facts inquired into," and (*b*) that any appeal from an order of the Illinois Commission "shall be heard on the record of the Commission as certified to by it." Ill. Rev. Stat. 1939, Chap. 111 2/3, Par. 72. It is thus evident (1) that the proof of record must sustain the Commission's action, (2) that that which is recited in the order as a basis for the decision must sustain the Commission's ultimate conclusion and action, and (3) that in considering the validity of an order the reviewing Court is confined to the order itself and the evidence of record before the Commission, that is, it may not take judicial notice of any essential fact. The Court may, of course, consider questions of law which is a judicial function.

Ostensibly, the basis of the Illinois Commission's disclaimer of jurisdiction was the *Chicago Producers case* (R. 10). As stated previously, however, the report and order in that case was not in evidence before the Illinois Commission. Commenting upon the decisions relied upon by petitioners to establish, and accepted by the Illinois Commission as showing, the terms and requirements of the alleged order of the Interstate Commission in the *Chicago Producers case,* the Supreme Court of Illinois stated preliminarily (R. 232-233):

> "In order to show that the State commission had been divested of jurisdiction over the intrastate commerce and rates involved in this proceeding it was essential, first, that the order of the Interstate Commission by which defendants assert the latter purported to assume jurisdiction over the subject matter be before the Illinois Commission. * * * In short, to establish their defense to the complaint, it was encumbent upon the defendants to prove the fact that an order had been entered in the *Chicago Producers case* on September 23, 1921, which contained findings having the legal effect attributed to them. The only

authoritative evidence of this requisite fact was the decision and order of the Interstate Commerce Commission itself."

In so holding, the Supreme Court of Illinois followed decisions of this Court in *Arkansas R. R. Commission* v. *Chicago, R. I. & P. R. Co.*, 274 U. S. 597, and *Illinois Central R. Co.* v. *Public Utilities Commission of Illinois*, 245 U. S. 493. In both of these latter cases carriers were seeking, like petitioners here, to increase intrastate rates upon the basis of orders allegedly entered by the Interstate Commission. But in neither instance did this Court permit the carriers, upon their own declarations, to escape the jurisdiction of a state commission and the exercise of its authority to protect intrastate shippers from excessive or illegal charges.

Continuing, the Illinois Court pointed out that if the Illinois Commission's order was premised on the *Chicago Producers case*, the said order was void because the decision in the latter case was not in evidence and the Illinois Commission could not, therefore, consider it. The Court said (R. 235-236):

"The decisive question is not whether an order was entered by the Interstate Commerce Commission but is, instead, whether the order of the Illinois Commerce Commission shows that such order was introduced as evidence at the hearing in the present proceeding and afforded a basis for its decision.

* * *

"Admittedly, the decision and order of the Interstate Commerce Commission was not offered or received in evidence. The Illinois Commission could not, therefore, consider it, as its order must be based on evidence presented at the hearing."

And quoting from another opinion previously rendered by it, the Illinois Court further said (R. 234)[17]:

> "The commissioners cannot act on their own information. Their findings must be based on evidence presented in the case, with an opportunity to all parties to know of the evidence to be submitted or be considered, to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal, and nothing can be treated as evidence which is not introduced as such."

And in the preceding rulings the Supreme Court of Illinois strictly followed decisions of this Court on the subject. *Cf. United States* v. *Abilene & S. R. Co.*, 265 U. S. 274; *Chicago Junction Case*, 264 U. S. 258; *Interstate Commerce Commission* v. *Louisville & N. R. Co.*, 227 U. S. 88.

While, as stated, the Illinois Commission ostensibly based its disclaimer of jurisdiction upon the requirements of the *Chicago Producers case*, it *actually* predicated its order upon *extraneous* statements and *dicta* culled from the reports in the *Chicago Gravel Co. case* and Ill. No. 10666 (Exhibit 7; R. 52, 165-196, 11-13). The Court held that the requirements and terms of the *Chicago Producers case* could not be established by statements from reports or orders in other cases, and that the cases from which the Commission quoted and upon which it relied did not, in fact or law, disclose the Commission's lack of jurisdiction or sustain its order in that regard. In its opinion, the Court said (R. 228):

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[17] This Court will, of course, recognize that the question presented in the case at bar is not whether a state commission can prevent a carrier from establishing rates validly prescribed by the Interstate Commission. Instead, as will be later developed, the issue of respondents' complaint was what rates **had been** established by publication of tariffs which had been lawfully filed and had become legally in effect. We draw this distinction: A rate may be prescribed by a commission, and in that view be legal, but, unless and until it is published in a tariff which becomes effective, it is not the legal or lawful rate for application to shipments. **Post**, pp. 49-56.

"The Commerce Commission reached the conclusion that the Interstate Commerce Commission did, in fact, assume jurisdiction over the traffic involved in this litigation. To support this finding it referred to its own order in Docket 10666 which cited the decision in *Chicago Gravel Co.* v. *Atchison, Topeka & Santa Fe Railway Co.*, 118 I. C. C. 633, decided November 30, 1926."

Again, the Court stated (R. 233):

"The disclaimer of jurisdiction by the Commerce Commission rests upon *quotations* from an order in its own *Docket No.* 10666 and from a report from the Federal Commission in *Chicago Gravel Co.* v. *Atchison, T. & S. F. R. Co.*, 118 I. C. C. 633,—*not upon the actual decision* and order *in the Chicago Producers case. The orders in those two proceedings disclose that no issue was involved in either case concerning the legality of the Jones tariff rates or the effect of the successive suspension orders of the Illinois Commerce Commission relative thereto. Manifestly, quotations in orders from the cases referred to by the commission did not constitute a competent basis for its order. These extraneous statements showed neither that the Illinois Commission lacked jurisdiction of the complaint nor that the Interstate Commission had assumed or still had jurisdiction over the intrastate rates here involved.* Particularly pertinent is the observation of this court in *Atchison, T. & S. F. R. Co.* v. *Commerce Com.*, 335 Ill. 624, 638, 645: 'The statement in one case that the tribunal in another had stated a particular fact is no evidence in another controversy upon a different issue between different parties and in another tribunal of the correctness of the facts stated'." (Italics ours.)

Whereupon the Court concluded (R. 235):

"The Commission's action in entering an order unsupported by competent evidence was arbitrary and unreasonable in the extreme and is void."

The Supreme Court of Illinois based its conclusions in the preceding particulars on the following cited opinions of this Court:

United States v. *Abilene & Southern R. Co.*, 265 U. S. 274;

Chicago Junction case, 264 U. S. 258;

Interstate Commerce Commission v. *Louisville & N. R. Co.*, 227 U. S. 88.

We briefly recapitulate: In rejecting the Illinois Commission's statement as to the effect or requirements of the *Chicago Producers case* the Supreme Court of Illinois held that since the order in that proceeding was not in evidence, the Illinois Commission had failed to conform to Section 65 of the Illinois Act requiring its order to be based upon evidence of record. In declaring that which the Commission set forth in its order to sustain its conclusion was incompetent to do so, the Supreme Court of Illinois was simply asserting what the most casual examination of the reports and orders, respectively, in the *Chicago Gravel Co. case* and in Ill. 10666 discloses. In concluding that the order was invalid for the reasons outlined the Court was otherwise merely applying an elementary principle of law that competent and substantial evidence is essential to sustain a verdict, judgment or decree—even an order of an administrative agency. *Cf. Baltimore & O. R. Co.* v. *United States*, 264 U. S. 258; *Interstate Commerce* v. *Louisville & N. R. Co.*, 227 U. S. 88.

Respondents respectfully submit that what has been set forth discloses that the judgment of the Supreme Court of Illinois, insofar as, by affirming the order of the Circuit Court, it set aside the order of the Illinois Commission, is unassailable in this Court for the following reasons:

1. The question presented and decided related to the validity of a negative order entered by a state administrative agency and whether it conformed to requirements prescribed by the state law and other principles of state practice. Such a question is exclusively within the competence of a state court to resolve.

Mobile, etc. R. Co. v. *Mississippi,* 210 U. S. 187;
Atlantic Coast Line v. *North Carolina Corp. Com.,* 206 U. S. 1;
Eastern R. Co. v. *Littlefield,* 237 U. S. '40;
Texas, etc. R. Co. v. *Abilene Cotton Oil Co.,* 204 U. S. 426.

2. It does not appear from the judgment that a federal question was presented for decision, or that a decision of a federal question was necessary to the disposition of the case.

Montgomery v. *Hernandez,* 12 Wheat. 129;
Arkansas Southern R. Co. v. *German National Bank,* 207 U. S. 270;
St. Louis, I. M. & S. R. Co. v. *Taylor,* 210 U. S. 281;
Cleveland & P. R. Co. v. *Cleveland,* 235 U. S. 50;
Williams v. *Oliver,* 53 U. S. (12 How.) 111;
Patterson v. *Stanolind Oil & Gas Co.,* 305 U. S. 376;
So. Western Bell Telephone Co. v. *State of Oklahoma,* 303 U. S. 206;
New York v. *Maltbie,* 303 U. S. 158;
Honeyman v. *Hanam,* 300 U. S. 14.

3. It rests upon grounds wholly independent of a federal question.

Williams v. *Oliver,* 53 U. S. 111;
Hancock National Bank v. *Farnum,* 176 U. S. 640;

Doyle v. *Atwell*, 261 U. S. 590;
Arkansas Southern R. Co. v. *German National Bank*, 207 U. S. 270;
Consolidated Turnpike Co. v. *Norfolk, etc., R. Co.*, 228 U. S. 596;
McCoy v. *Shaw*, 277 U. S. 302;
Klinger v. *Missouri*, 13 Wall. 257;
Delaware, etc. Nav. Co. v. *Reybold*, 142 U. S. 636.

4. It merely resolves the power and authority of the Illinois Commission in relation to the Illinois Act and thus applies local law and practice, matters ordinarily not subject to review by this Court.

Hibben v. *Smith*, 191 U. S. 310;
American Railway Express Co. v. *Commonwealth of Kentucky*, 273 U. S. 269;
Mobile, etc. R. Co. v. *Mississippi*, 210 U. S. 187;
Patterson v. *Colorado*, 205 U. S. 454;
Atlantic Coast Line R. Co. v. *North Carolina Corp. Commission*, 206 U. S. 1;
Central Vermont R. Co. v. *White*, 238 U. S. 507.

5. The validity of the provisions of the Illinois Act not being in issue, if the judgment does in fact construe rather than merely give effect to and apply a state statute, the manner of construction in the present case does not present a federal question and is not open to review in this court.

Commercial Bank v. *Buckingham*, 5 How. 317;
Grand Gulf R. Co. v. *Marshall*, 12 How. 165;
Supreme Lodge, etc. v. *Meyer*, 265 U. S. 30;
American Railway Express Co. v. *Oyster Guano Co.*, 273 U. S. 274;
Des Moines National Bank v. *Fairweather*, 263 U. S. 105;
Campbell v. *California*, 200 U. S. 87.

6. In setting aside the order of the Illinois Commission, the action of the Supreme Court of Illinois amounted to no more than a reversal and remanding, action ordinarily not a proper subject for judicial inquiry by this Court.

Schlosser v. *Hemphill*, 198 U. S. 175;
Houston v. *Moore*, 16 U. S. (3 Wheat.) 433;
Louisiana Nav. Co. v. *Oyster Commission of Louisiana*, 226 U. S. 99;
Washington v. *Coats-Fordney Logging Co.*, 243 U. S. 251.

7. It results that no federal ground upon which a *writ of certiorari* may issue obtains.

Klinger v. *Missouri*, 13 Wall. 257;
Browne v. *Union Pacific R. Co.*, 267 U. S. 255;
Southern Pacific Co. v. *Schuyler*, 227 U. S. 601;
Dertoit & Mackinack R. Co. v. *Paper Co.*, 248 U. S. 30.

Second: We come, then, to the final aspect of the judgment of the Supreme Court of Illinois. In addition to holding the Illinois Commission's order invalid, it was adjudged that the Illinois Commission had jurisdiction, that the Jones tariff rates were not legally applicable, that the exaction of said rates were illegal, and that accordingly the rates declared legally applicable and in effect should have been applied (R. 236-237). The issue before the Illinois Commission was simply, as the Court stated, (R. 231) not what rates may have been prescribed years ago, but "whether the correct and legal tariff rate had been applied."

That issue was equally simple of solution; to determine it required merely the ascertainment of whether during the period in question the Jones tariff rates had become

legally in effect, and if the described rates were not legally applicable, what the legal rates were. If the latter were less than the Jones tariff basis, it followed that respondents had been overcharged and were, on the general merits of the case, entitled to the relief prayed.

In the final analysis, as we propose to demonstrate, all that the Supreme Court of Illinois has done in the present regard is to simply require, in accordance with Illinois law, that the tariffs and rates lawfully on file with the Illinois Commission and legally in effect at the time shipments were made, be observed and applied.

The suspension orders entered by the Illinois Commission established that the Jones tariff did not become effective and that the rates therein contained, for the period September 10, 1925 to February 15, 1927, never became legally applicable (R. 216, 219; Exhibit 6, R. 51, 147-164). In its order of November 30, 1926, the Commission held (R. 157):

> "We further find upon this record that the rates published by the carriers are not justified and that the tariff should be permanently cancelled and stricken from the files of the Commission."

Thereafter, it was ordered that the Jones schedule, among others, "be, and the same are hereby cancelled, annulled and set aside and stricken from the files of the Commission" (R. 162). The proof is undisputed that the tariffs lawfully on file with the Illinois Commission at the time respondents' shipments were transported, named single line rates of 60 cents and connecting line switching charges of $3.60 per car upward (Exhibits 1 and 3, R. 211-213, 42-46, 52-53). It is, of course, axiomatic that when the Jones tariff and the increased rates therein set

forth were not permitted to be made effective that those tariffs and rates which the former schedule sought to cancel and supersede continued and remained in effect.

In commenting upon the question under consideration, the Supreme Court of Illinois stated (R. 227):

> "During the period between September 10, 1925, and February 15, 1927, the defendants exacted and collected the increased rates and charges for the transportation of complainants' [respondents'] carload shipments * * * from their plants * * * to all destinations on the lines of the defendants in the Chicago switching district as published in the tariff suspended by the Commerce Commission in its order No. 15539. It thus appears that between September 10, 1925, and February 15, 1927, the defendants did not comply with the Commission's suspension order but collected a rate of 65 cents per ton upon shipments from complainants' plants destined to deliveries in the Chicago District on the lines of the defendants, and where destined to points on connecting lines in the Chicago District, collected, as agent for the latter carriers, an additional charge of 30 cents per ton."

Again, the Court stated (R. 236):

> "We hold that the suspension of the Jones tariff of increased rates by the Illinois Commerce Commission was a valid exercise of its authority conformably to sections 36 and 37 of the Public Utilities act. The suspension orders were in effect during the period in question and intrastate shippers were entitled to the benefit of the prevailing lower rates under the suspension orders. It is conceded that defendants did not comply with the terms of these mandates. Since the legal rates were not applied to complainants' shipments they were entitled to reimbursements of the overcharges. The Circuit Court, it follows, properly reversed the decision of the commission to the contrary."

Section 37 of the Illinois Act[18] like Section 6 (7) of the Interstate Act,[19] provides in part:

> "* * * no public utility shall charge, demand, collect or receive a greater or less or different compensation * * * for any service rendered * * * than the rates or other charges applicable to such product or commodity or service as specified in its schedules on file or in effect at the time. * * *"

Section 79 of the Illinois Act[20] makes it the duty of the Illinois Commission "to see that the provisions of the Constitution and statutes of this state affecting public utilities * * * are enforced and obeyed. * * *" And Section 1 provides that the provisions and requirements of the Act shall be "administered" by the Commission.[21]

In holding the Jones tariff rates illegal and that the rates contained in tariffs lawfully on file with the Illinois Commission at the time constituted the only legal and lawful basis of rates applicable to respondents' traffic, the Supreme Court of Illinois was simply enforcing the preceding mandates and requirements of the Illinois statute, and, by remanding the cause with directions, requiring the Illinois Commission to do likewise. Instead of committing error in that regard, the Supreme Court of Illinois strictly followed the decisions of this Court on the subject.

In *Armour Packing Co.* v. *United States*, 209 U. S. 58, this Court said concerning the duty of a carrier to observe rates named in tariffs lawfully on file and in effect (p. 81):

> "But the law is not limited to giving equal rates by indirect and uncertain methods. It has provided

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[18] Ill. Rev. Stat. 1939, Chap. 111⅔, Sec. 37.

[19] C. 91, Sec. 411, 41 Stat. 483, 49 U. S. C. A., Sec. 6, Par. (7).

[20] Ill. Rev. Stat. 1939, Chap. 111⅔, Par. 83.

[21] Ill. Rev. Stat. 1939, Chap. 111⅔, Par. 1.

for the establishing of one rate, to be filed as provided, subject to change as provided, and that rate to be, while in force, the only legal rate. Any other construction of the statute opens the door to the possibility of the very abuses of unequal rates which it was the design of the statute to prohibit and punish."

In *United States* v. *Miller,* 223 U. S. 599, 602, 603, the ruling was to the same effect:

> "That the Act imposes upon common carriers subject to its provisions the duty of establishing in a prescribed mode the rates * * * to be charged for the transportation * * * and that the rates so established are obligatory alike upon carrier and shipper and must be strictly observed by both until changed in a mode prescribed, are propositions which are not only plainly stated in the Act, but settled in repeated decisions of this Court."

In *Minneapolis, St. P. & S. S. M. R. Co.* v. *Washburn-McKnight Coal Co.,* 254 U. S. 370, the Court said (pp. 371-372):

> "There was no contract, express or implied, on the part of the shipper to pay any rate other than that shown in the tariff filed and published according to law,—the Court saying on this point: 'Manifestly, if shippers cannot rely upon the rates as so published and filed, the requirement for publication becomes a mere trap for the unwary. *In our judgment it is wholly improper * * * for a Court to find that a shipper had in effect undertaken conditionally to pay according to a rate different from that published in compliance * * * with the statute'." (Italics ours.)

And in a companion case, *Minneapolis, St. P. & S. M. R. Co.* v. *Merrick,* 254 U. S. 376, 377, this Court sustained a judgment of the Supreme Court of North Dakota and the jurisdiction of that Court to enter it, awarding a shipper

restitution for the exaction of illegal rates where carriers, like petitioners, declined to observe the tariffs lawfully on file and rates legally in effect.

There is another reason why the judgment of the Supreme Court of Illinois in the particular under discussion is not, as petitioners claim, erroneous, and which is, namely, that a tariff and the rates therein named has, so long as it is in force and until legally superseded, the effect of a statute. In *Pennsylvania R. Co.* v. *International Coal Mining Co.*, 230 U. S. 184, this Court, among other things, said in such regard (p. 197):

> "*The statute required the carrier to abide absolutely by the tariff.* It did not permit the company to decide that it had charged too much and then make a corresponding rebate; *nor could it claim that it had charged too little, and insist upon a larger sum being paid by the shipper.* * * * *the tariff, so long as it was in force, was, in this respect, to be treated as though it had been a statute,* binding as such upon railroad and shipper alike." (Italics ours.)

It is elementary that a statute remains in force until repealed, and the act by which the repeal is accomplished becomes effective. It must similarly be true that a tariff remains in force until it is superseded by another tariff which becomes lawfully effective. In the present case, until the tariffs, rates and charges which the Jones tariff schedule sought to cancel were in fact and law superseded by the latter tariff, the former remained the legal and lawful rates. Here, the Jones tariff did not supersede the other tariffs and rates as of and prior to February 15, 1927, for the simple, yet conclusive, reason that it never became effective by virtue of the suspension orders entered by the Illinois Commission.

Petitioners' only answer (Pet. p. 41) is that, according to petitioners, in *American Express Co.* v. *Caldwell,* 244 U. S. 628, this Court held that a carrier was not obliged to observe rates lawfully on file with a commission and thereby legally in effect if there was an order of a commission requiring different rates. In other words, petitioners, asserting that the Illinois Court's conclusion was erroneous in that it held that rates legally in effect should be applied, attribute to this Court a holding that an order of the Interstate Commission, for example, is itself a sufficient basis for the imposition of intrastate rates irrespective of whether a tariff naming those rates has been filed and has become effective. But casual examination of the opinion in that case discloses no holding or rule to such effect.

The rule frequently announced by this Court is directly to the contrary. Thus in *Louisville & N. R. Co.* v. *Maxwell,* 237 U. S. 94, the Court, referring to the effect of Section 6 (7) of the Interstate Act which, like the Illinois Act, enjoins observance of rates "which are specified in the tariff filed and in effect at the time," stated (p. 97):

> "*Under the interstate commerce act, the rate of the carrier duly filed is the only lawful charge.* Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it. * * *
>
> "* * * *it is beyond the power of the carrier to depart from the filed rates,* * * *.*" (Italics ours.)

The decision in *Keogh* v. *Chicago & N. W. R. Co.,* 260 U. S. 156, 163, is to the same effect:

> "* * * *The legal rights of a shipper as against a carrier in respect to a rate are measured by the published tariff. Unless and until suspended or set aside, this rate is made, for all purposes, the legal rate as*

> *between carrier and shipper.* The rates, as defined by the tariff, cannot be varied or enlarged by either contract or tort of the carrier. * * * This stringent rule prevails, because otherwise the paramount purpose of Congress—prevention of unjust discrimination—might be defeated." (Italics ours.)

No federal question is presented, it is respectfully submitted, where a state court (1) simply compels a state administrative agency to enforce statutory provisions comprehending the subject matter of complaint filed with it, and (2) merely requires on intrastate traffic the application of tariffs lawfully on file with the state commission and the rates contained in such tariffs legally in effect at the time shipments were transported.

Beyond doubt the requirement that intrastate rates legally in effect be applied does not conflict with the Federal Constitution or the Interstate Act for the fundamental purpose of all rate regulatory legislation is to require observance of charges contained in tariffs lawfully on file and in effect. And it is equally manifest that such a ruling does not and could not result in conflict with any decision of the Interstate Commission for no question as to any such decision is presented or involved in determining what tariff and rates are lawfully on file and in effect. Petitioners' claim that the Illinois Supreme Court improperly construed or failed to give effect to an order of the Interstate Commission is, in the face of the elementary propositions stated, utterly untenable in point of fact and is, indeed, a *reductio ad absurdum.*

Besides the considerations outlined, the ruling of the Supreme Court of Illinois in the respect presently under consideration relates to the remedy, and matters affecting

the remedy are governed by the law of the forum. A decision of a state court in that regard is not ordinarily reviewable by this Court. *Central Vermont R. Co.* v. *White,* 238 U. S. 507. There is in this regard, as before, no contention made by petitioners that any state statute is itself invalid, and, at best, all that petitioner's claims could amount to is no more than that the state law has not been correctly construed. But in a case like that at bar, the latter proposition presents no federal question and this Court will not usually judicially review the action of a state supreme court construing, by application, a state statute. *Commercial Bank* v. *Buckingham,* 5 How. 317; *Grand Gulf R. etc. Co.* v. *Marshall,* 12 How. 165; *Watson* v. *Maryland,* 218 U. S. 173; *Supreme Lodge etc.* v. *Meyer,* 265 U. S. 30; *First National Bank* v. *Ayers,* 160 U. S. 660; *Tampa Water Works* v. *Tampa,* 199 U. S. 241; *Hibben* v. *Smith,* 191 U. S. 310.

And the ruling of the Supreme Court of Illinois requiring the Illinois Commission to observe a local statutory mandate and procedure does not present a reviewable federal question. *French* v. *Hopkins,* 125 U. S. 524; *Central Vermont R. Co.* v. *White,* 238 U. S. 507.

In *Missouri Pacific R. Co.* v. *McGrew Coal Co.,* 256 U. S. 134, this Court held that the construction of a state statute by the Supreme Court of Missouri and the awarding of damages under such a construction did not, as carriers contended, violate rights secured to the latter by the Federal Constitution. In that regard, the Court observed (p. 135):

> "The objection now made, that the shipper did not pay freight charges, and therefore was not damaged, raised no substantial Federal question, but a question of state law, which we have no jurisdiction to review."

In a companion case, *Missouri Pacific R. Co.* v. *McGrew Coal Co.*, 224 U. S. 191, the question presented related to the exaction of illegal rates, and the action of the Supreme Court of Missouri, which affirmed the judgment of the lower Court, awarding the shipper restitution. Among other things, the defense was that the application of the state statute was in conflict with and repugnant to the Federal Constitution. This Court, however, declined to review, on the merits, the action of the State Court.

Furthermore, it was proper for the Supreme Court of Illinois to affirmatively determine the issue as to the illegality of the Jones tariff rates, for that question, like the construction of a tariff, is one of law. *Great Northern R. Co.* v. *Merchant's Elevator Co.*, 259 U. S. 285; *Standard Oil Co.* v. *United States*, 283 U. S. 235; *Pennsylvania R. Co.* v. *Puritan Coal Mining Co.*, 237 U. S. 120.

It is equally proper for the Illinois Supreme Court to consider the evidence, and, upon the basis thereof, remand the cause and require adherence to the proof, for the "legal effect" of evidence is a question of law. *Interstate Commerce Commission* v. *Louisville & N. R. Co.*, 227 U. S. 88.

In addition, the points made previously, *ante*, p. 40, in respect of the validity of the Illinois Court's action in holding void the order of the Commission are here applicable.

There is no reviewable error in the decision of the Supreme Court of Illinois in the preceding particulars. That would still be the fact even if a federal question were presented, for the Illinois Court has, in every instance, followed the decisions of this Court on the subject.

On the Merits, Petitioners' Claims Respecting an Alleged Jurisdictional Issue are Without Substance.

Doubtless what has been set forth is adequate to demonstrate that the petition herein discloses no real or genuine basis upon which the jurisdiction of this Court may be invoked. In order that there may be no doubt of that fact, we desire, in conclusion, to briefly consider the issue on its general merit and establish (*a*) that the proof shows that the Jones tariff is not responsive to any order entered by the Interstate Commission and that, therefore, the action of the Supreme Court of Illinois in holding that the Illinois Commission had jurisdiction of respondents' complaint was correct on the facts, and (*b*) that, as a matter of law, the Illinois Commission or the state courts, rather than the Interstate Commission, as the Illinois Commission held, are the only tribunals which would have jurisdiction in the premises.

Reduced to its essentials, petitioners' claim in this particular, which in reality is no defense to respondents' action, is that in the Jones tariff they were complying with the order allegedly entered by the Interstate Commission in the *Chicago Producers case*. They claim that either by the fixation of a relationship between intra- and interstate rates, or by the fixation of intrastate rates of a specific measure, the Jones tariff basis was required. The point we make in this regard is that if it be established that the described claims are erroneous and without substance, nothing that the Supreme Court of Illinois has done in its decision herein could possibly be held erroneous or present a question for review by this Court.

Both the Interstate Commission and the Illinois Commission have expressly denied petitioners' claims in the preceding regard. In the *Chicago Gravel Co. case* the Interstate Commission said (Exhibit 4, R. 51, 92-134, 104):

> "This general adjustment is set forth in a tariff known as Jones 420. * * * It was the culmination of a long series of conferences between the interested carriers and the shippers."

And in Ill. No. 15878, the Illinois Commission declared (R. 152)[22]:

> "As a result of these numerous conferences the carriers serving the Chicago Switching District published and filed with the several commissions B. T. Jones' Tariff 420, Illinois C. C. 171."

If it were true that the Jones schedule reflected rates prescribed, it is not clear how the rates therein contained could at the same time be the result of compromise and "a long series of conferences."

According to petitioners, the order in the *Chicago Producers case* became effective January 5, 1922 (Exhibit 1, R. 42, 211, 31). The legal presumption is that petitioners complied with the order on that date. We digress to observe that petitioners' representation that they were responding to the order some three years after its effective date, in rates published in the Jones tariff, is rather suspicious on its face. To continue: The evidence shows that on January 5, 1922, petitioners reduced the interstate rates from the outer-zone or Zone II from 4 cents to 3.75 cents per cwt. No change was made at that time in the intrastate rates from the inner or Zone I which were and remained 3.5 cents per cwt. Those rates reflected a differ-

[22] It is obvious, of course, that not all shippers agreed to the Jones Tariff for respondents, among others, protested the same and secured the suspension thereof (R. 216-219).

ential relationship of 5 cents (Exhibit 1, R. 42, 211). Since no intrastate rates were changed it is self-evident that the order in the case cited did not relate thereto.

For the purpose of the point, however, we may assume that both rates were prescribed in the *Chicago Producers case*. If they were so prescribed, the evidence establishes that the order in the *Chicago Producers case* was subsequently modified by *Reduced Rates, 1922,* 68 I. C. C. 676, decided May 16, 1922, and *Illinois Commission Order No.* R2251, dated June 20, 1922 (Exhibits 1 and 3, R. 42, 44, 211-213). Both orders were to the same effect. In the first, the Interstate Commission required, effective July 31, 1922, a general 10 per cent reduction in rates, including those applicable to sand and gravel. Applying that reduction to the inner or Zone I intrastate rates of 3.5 cents per cwt. in effect prior to July 31, 1922, results in a charge of 3.15 cents, which under the rule for disposition of fractions in turn results in a rate of 3 cents per cwt.

In other words, if it be assumed that the Interstate Commission prescribed in the *Chicago Producers case* an intrastate rate of 3.5 cents from the inner zone, that rate became, as a result of *Reduced Rates, 1922,* 3 cents. And that what we have stated is the actual situation is shown by the fact that petitioners, on July 31, 1922, published intrastate rates of 3 cents from the inner zone and a rate of 3.25 from the outer-zone, the latter reflecting a 5 cent differential over the inner zone adjustment (R. 211). The matter is simply a question of arithmetic.[23]

[23] In the **Chicago Gravel Co. case** it was suggested, by way of **dictum** (R. 104), that the inner zone rate, reduced by **Reduced Rates, 1922**, would be 3.25 cents per cwt. The Commission's statement is palpably erroneous since a rate of 3.5 cents reduced by 10% would result in a charge of 3 cents, as noted.

It follows that petitioners were not required, in the view most favorable to them, to maintain, or justified in exacting, a rate in excess of 3 cents per cwt., or 60 cents per ton from the inner-zone. Petitioners' claim, therefore, that the Jones tariff basis of 65 cents was required falls flat in the face of the proof. The very most that petitioners' could claim under the *Chicago Producers case,* with all the assumptions we have indulged, is that rates of 60 cents were established from respondents' plants. It results, therefore, that in holding the Illinois Commission had jurisdiction of respondents' complaint which alleged not that the 60 cent rates were illegal, but that the 65 cent rates were of that character, the Supreme Court of Illinois was correct as a matter of fact.

Moreover, it may be doubted that the defense of the *Chicago Producers case,* even if it prescribed the Jones tariff rates, would be tenable. The issue of respondents' complaint, if we may repeat, was that rates in excess of those legally in effect were exacted. The only competent defense thereto, we submit, would be a showing that the rates contained in tariffs lawfully on file with the Illinois Commission and legally in effect, were applied to respondents' traffic.

For, as this Court stated in *Davis* v. *Portland Cement Co.,* 264 U. S. 402, 425, the "statute required rigid observance of the tariff, without regard to the inherent lawfulness of the rates specified."

And in *Armour Packing Co.* v. *United States,* 209 U. S. 58, 81, to which we have heretofore referred, it is said that a tariff and rate once in effect can be changed only in a manner provided by statute, which is the publication of another tariff containing different rates which are per-

mitted to become legally effective. *United States* v. *Miller*, 223 U. S. 599, 602, holds likewise, stating that a tariff and rate in effect can be changed only in the "mode prescribed". In *Louisville & N. R. Co.* v. *Maxwell*, 237 U. S. 94, 97, this Court declared that only the tariff rate "duly filed" is the "lawful charge." The Jones schedule having not become effective, the tariff rates "duly filed" constituted the only "lawful charge" irrespective of any other consideration.

The point we make is that while a rate prescribed by a commission may be legal in the sense that it conforms to the requirements of reasonableness, etc., it is not the lawful rate for prospective application to shipments until it has been published in a tariff which has become legally in effect. Section 6 of the Interstate Act [24] and Sections 33, 35 and 37 of the Illinois Act [25] make that evident beyond question.

Furthermore, if the petitioners believed that the Jones rates were required by the Interstate Commission they should have presented such objection as they urge here to the Illinois Commission when it suspended the said tariff and rates. Or, if that procedure was not available, petitioners should have sought to enjoin the Illinois Commission from enforcing the suspension orders, or brought a mandamus proceeding to compel that Commission to permit the Jones tariff to become effective on intrastate traffic. *Cf. Illinois Central R. Co.* v. *Utilities Commission of Illinois*, 245 U. S. 493; *Arkansas R. R. Commission* v. *Chicago R. I. & P. R. Co.*, 274 U. S. 597. But as the Supreme Court of Illinois, in its decision herein, observed (R. 226):

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[24] C. 91, Sec. 411, 41, Stat. 483, U. S. C. A. Title 49, Sec. 6, Par. (7).
[25] Ill. Rev. Stat. 1939, Chap. 111⅔, Pars. 33, 35, 37.

"Defendants [petitioners], and, so far as the record discloses no one else, challenged the validity of the successive suspension orders."

Clearly, petitioners' application is without equity.

In the final analysis the spectacle presented here is that of petitioners ignoring the laws of Illinois, the suspension orders of the Illinois Commission, and, taking the law into their own hands, imposing rates they were bound, as a matter of law, to know had not been permitted to become effective, and were hence illegal. And petitioners did all this on their own declaration that the rates imposed had been prescribed by the Interstate Commission. They take the position that their mere assertion is conclusive, and they propose that it shall not be open to investigation or inquiry.

But respondents suggest the decisions of this Court will afford petitioners no justification for their action.

Thus in *Western Distributing Co.* v. *Public Service Commission,* 285 U. S. 119, this Court under a similar fact situation held (pp. 124-125):

"The state authority, whose powers are invoked * * * is certainly entitled to be informed whether advantage has been taken of the situation * * *."

Again in *Western & A. R. Co.* v. *Georgia Public Service Commission,* 267 U. S. 493, it was declared (p. 496):

"* * * the commission was fully justified in refusing to sanction a discontinuance of service until a petition had been filed with the commission, and a showing made."

In the above case this Court characterized action like petitioners here have taken as "arbitrary and defiant."

And in *Wadley S. & R.* v. *State of Georgia*, 235 U. S. 651, it was held (p. 669):

> "*But where*, as here, *after reasonable notice of the making of the order, the carrier failed to resort to the safe, adequate, and available remedy by which it could test in the courts its validity, * * * it is subject to the penalty when that defense, as here, proved to be unsuccessful.*" (Italics ours.)

It would seem, moreover, that petitioners are in no position to challenge the decision of the Supreme Court of Illinois since the suspension orders of the Illinois Commission suspending and later setting aside the Jones tariff are, as already indicated, conclusive on the question of whether the Jones rates were legally applicable.

Which brings us to the final point we desire to note: Whether, as matter of law, the Illinois Commission had jurisdiction in the premises or whether, on the other hand, that jurisdiction resided in the Interstate Commission? The order of the Illinois Commission is of a very peculiar character: It holds (*a*) that the Illinois Commission had no jurisdiction to determine whether, from tariffs and rates lawfully on file with it and legally in effect, intrastate shipments were overcharged, and (*b*) that the Interstate Commission had jurisdiction of such a question (R. 17).

In its order the Illinois Commission does not find that the rates which respondents claim were legally applicable had been prescribed by the Interstate Commission. It does not find that such intrastate rates had been declared by the Interstate Commission unduly prejudicial or unjustly discriminatory against interstate shippers or interstate commerce. It does not find that the Jones tariff rates had been prescribed by the Federal Commission, or that they had

been required by that tribunal to remove undue prejudice or unjust discrimination, as aforesaid. It does not find that the Illinois Commission had jurisdiction to determine whether illegal intrastate rates had been exacted and then dismiss respondents' complaint on the ground that the legal rates had been applied. It does not determine what rates were legally applicable. It does not show how or why the Interstate Commission had jurisdiction. After finding or failing to find as above related, the Illinois Commission concluded that it had no authority to award reparation and over-ride an order of the Interstate Commission (R. 17). But there was no issue before the Illinois Commission seeking "reparation", that is, damages for the exaction of unreasonable or excessive rates (R. 21-29). In short, the Illinois Commission, without determining any essential fact to support its conclusion, simply asserted in a sweeping declaration that it was without any jurisdiction whatever in the premises.

The question arises if the Illinois Commission or state courts do not have jurisdiction of the subject matter of respondents' complaint, what tribunal, if any, does? Does the Interstate Commission possess jurisdiction to determine what intrastate rates are legal or whether illegal intrastate rates have been imposed on intrastate traffic?

The only power possessed by the Interstate Commission in respect of intrastate rates is that conferred by Sections 13 (4) and 3 (1) of the Interstate Act.[26] But those provisions confine the authority of the Interstate Commission to the removal of undue prejudice or unjust discrimination

[26] C. 91, Sec. 416, 41, Stat. 484, U. S. C. A. Title 49, Sec. 13, Par. (4); C. 91, Sec. 405, 41 Stat. 479, U. S. C. A. Title 49, Sec. 3, Par. 1.
It will be noticed that the petitioners do not rely upon either of these last mentioned statutory provisions, but keep referring to and relying upon Section 13 (3) of the Act, which only provides for a joint hearing and takes no jurisdiction from any state commission.

against interstate shippers or interstate commerce resulting from intrastate rates. There is no provision anywhere in the Interstate Act which authorizes the Interstate Commission to determine the reasonableness *per se* of an intrastate rate or adjudicate an issue relating to the exaction of illegal state rates on intrastate traffic. *Cf. Simpson* v. *Shepard,* 230 U. S. 352; *Florida* v. *United States,* 282 U. S. 194; *Louisville & N. R. Co.* v. *Garrett,* 231 U. S. 298.

Now, although the Illinois Commission has attributed jurisdiction to the Interstate Commission and petitioners have asserted a proposition having the same effect, the Interstate Commission has itself denied that it possesses jurisdiction in respect of the intrastate rates to which respondents' complaint appertains. Such was what the Interstate Commission held in *Chicago Fire Brick Co.* v. *Chicago & N. W.R. Co.,* 123 I. C. C. 164, decided March 16, 1927. In that case a receiver, rather than a producer as is here the case, filed a complaint with the Interstate Commission relating to intrastate rates from the inner zone to the Chicago district for part of the period covered by respondents' complaint. The Interstate Commission dismissed the complaint holding (p. 164):

> "We are without authority in this proceeding to pass upon the lawfulness of the rates assailed from points in Illinois to complainants in the Chicago switching district, because those rates apply only on intrastate movement."

Unless, therefore, it is to be held that there is no forum to which respondents may appeal to determine whether illegal rates have been imposed on their intrastate shipments, the inexorable logic of the situation compels the conclusion that the Illinois Commission had jurisdiction as a matter of law.

We inquire, therefore, in conclusion: Where is there substance to petitioners' alleged errors? They allege that the Supreme Court of Illinois committed error in holding that the Illinois Commission had jurisdiction, but the facts of record, the law, and even the Interstate Commission itself supports the Illinois Court's conclusion.

Respondents respectfully suggest that this Court might well conclude that the petition herein is frivolous and essentially fictitious. *Cf. Millinger* v. *Hartupee*, 73 U. S. 258; *U. S. Fidelity & Guarantee Co.* v. *Oklahoma*, 250 U. S. 111; *Deming* v. *Carlisle Packing Co.*, 226 U. S. 102; *Erie R. Co.* v. *Solomon*, 237 U. S. 427.

Conclusion.

Petitioners have argued numerous other errors, but we think that, upon examination, it will be found that the Supreme Court of Illinois has done none of the things attributed to it by petitioners. We consider also that matters petitioners complain of do not constitute the basis of the Illinois Court's decision, but amount rather to the rejection of petitioners' contentions. In such circumstances respondents perceive no occasion to debate questions and issues which in no view could be controlling.

For the reasons heretofore set forth respondents respectfully submit that the petition for a *writ of certiorari* herein should be denied.

Respectfully submitted,

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